IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

ARMAND SCHMOLL, INC.,

Petitioner,

v.

THE FEDERAL RESERVE BANK OF NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

BRIEF FOR PETITIONER

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So far as the plaintiff in error is concerned, he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court, which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and *holding* of the *McClung* case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority 51

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THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The official report of the opinions delivered in the Court of Appeals is contained in 286 N. Y. 503-525. A copy is printed at pages 34-52 of the Record. The opinion of Mr. Justice Rosenman at Special Term was not reported, but a copy appears at pages 28-29 of the Record.

The Statement of the grounds of this Court's "Jurisdiction to Review" the Summary Statement of the Matter Involved," the "Statement of Facts," the "Statutes Involved" and the "Questions Presented," contained in the annexed Petition, are hereby referred to and repeated with the same force as if herein set forth.

Questions Presented and Specification of Errors

The "Questions Presented" at pages 11, 12 and 13 of the annexed Petition for writ of certiorari are the Questions Presented and the assigned errors which Petitioner desires to urge.

Supplemental Statement

The facts in addition to those stated in the annexed Petition may in their essentials be put briefly as follows: By § 522(c), of the Tariff Act of 1930 (June 17, 1930, c. 497; IV, § 522(c) (46 Stat. 739); Title 31, U. S. C. § 372) it became the statutory ministerial duty of Respondent to certify daily to the Secretary of the Treasury the actual buying rates in the New York market for cable transfers payable in Brazilian milreis. The Petition shows that all the daily transactions were duly reported, as required, to the Respondent, and that the actual market rates, continuously prevailing throughout the three months covered by the Petition were in the official possession and knowledge of Respondent, and that it was an actual New York market and that such exchange could be had at firm rates constantly throughout this period (R. (fol. 8) 8-11, 16-19 (fol. 8)). It appears that notwithstanding Respondent's possession of its official evidence to the contrary (see annexed Petition for certiorari, pp. 4, 5), it certified daily a higher rate than the actual New York market rates, characterizing each rate it certified: "Nominal rate. Firm rate not available" (R. (fol. 8) 7-8, 9, 10). In substance the actual market rates did not exceed $0.585 per milreis in this period but the Respondent certified rates no lower than $0.08250 and as high as $0.084700 (R. 8, 9, 10, 14, 15, 16, 17, 18, 19).

Summary of Argument

(1) The Issues Really Involved.

(2) The Courts below erred in holding that the Supreme Court of New York was without jurisdiction to order respondent to comply with Section 522(c) of the Tariff Act of 1930, inasmuch as the Supreme Court, although a state court, can exercise its ordinary jurisdiction to compel respondent to comply with the federal law or to cease violation thereof, which, as the Supreme Law of the land, is also the law of the State of New York;

and this because its order directing respondent so to do would not in any way interfere with respondent's duty or destroy or impair its official ability to perform its mandatory statutory function, and so would not encroach in anywise upon the sovereignty of the federal government.

(A) Concurrent Jurisdiction of State Courts.

(B) The reporting of the market rates in compliance with the tariff act is not and should not be an exception to the rule of concurrent jurisdiction.

(C) The Congress has not granted exclusive jurisdiction over market rates to any federal authority.

(D) The local law, including substantive remedies, is made applicable by this Court.

(3) *McClung* v. *Silliman,* 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely obiter.

So far as the plaintiff in error is concerned. he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and *holding* of the *McClung* case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority.

(4) The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying Petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits.

ARGUMENT

POINT FIRST

The Issues Really Involved.

With the Respondent certifying rates on an average some 50% higher than the actual New York market rates prescribed, the issue in this case becomes and may be definitely stated:

It is whether the Supreme Court of New York, solely because it is a state court, is without jurisdiction to compel the Respondent, a resident corporation of New York, to perform the duties imposed upon it by a federal statute, § 522(c) of the Tariff Act of 1930, in the manner prescribed and directed by that Statute.

It appears from the Act and from the Petition that these duties were simply mandatory and ministerial. Respondent's only duty is to ascertain the buying rates in the New York market at noon on each day, a simple arithmetical calculation from market rates which at the time varied only a few hundredths of a cent every day and from day to day and report them to the Secretary of the Treasury. Respondent, by its motion to dismiss, admitted not only that the rates it certified were not the actual market rates and, accordingly, that it exceeded its powers under the statute, but that the actual New York market rates were as set forth in Schedule B of the Petition (R. 16 (fol. 23)).

Mandamus or its equivalent is the proper means to correct these abuses of statutory power and courts may direct compliance with a statutory mandate, even though their interpretation of the statute prescribing the agent's jurisdiction may have the effect of requiring the agent to act in a particular way. (*Baird* v. *Supervisors,* 138 N. Y. 95, 115, 116; *Matter of Lewis* v. *Carter, Individually and as the Board of Parole for State Prisons,* 220 N. Y. 8, 18; *People ex rel. Equitable Life Ass. Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514; *Matters of Potts* v. *Kaplan,* 264 N. Y. 111, 117-118; *Louisville Cement Co.* v. *I. C. C.,* 246 U. S. 638 642, 644; *Wilbur* v. *Krushnic,* 280 U. S. 306, 318; *Miguel* v. *McCarl,* 291 U. S. 442, 452, 456; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, 238; *I. C. C.* v. *Northern Pacific Ry. Co.,* 216 U. S. 538, 544-5.) With a market for cable transfers actually continually existing in New York there is no discretion vested in Respondent by the Tariff Act. Respondent's duties prescribed by Section 522(c) are mandatory, and it is a jurisdictional limitation upon the Respondent's power that the rates it certifies must be the buying rates for cable transfers payable in the foreign currency in the New York market at noon on each day (*Waite* v. *Macy,* 246 U. S. 606, 608-10, aff'g *Macy* v. *Brown,* 225 Fed. 359, and cases there cited; *I. C. C.* v. *Northern Pacific Ry Co.,* 216 U. S. 538; *De Lima* v. *Bidwell,* 182 U. S. 1, 175-7). Thus the sole question is the validity of the Respondent's claim that, as a federal agent, he cannot be controlled by a state court. Under the federal Constitution, state courts have jurisdiction concurrently with the federal courts to protect and enforce rights created by federal statute. Congress may limit that concurrent jurisdiction by granting exclusive jurisdiction to the federal courts, but the question is always, "Has it done so?" The failure of the Congress to take that action as to the rights created by § 522(c) of the Tariff Act is a clear indication that its intention was not to limit the ordinary powers of the state courts to enforce those rights. That such was the

intention of the Congress is confirmed by the fact that, while it had withheld from the federal courts having personal jurisdiction over the Respondent the power to issue original writs of mandamus, it had already deprived the Respondent of its immunity from suit as a federal agent by specifically providing that a Federal Reserve Bank "shall have power * * * to sue and be sued, complain and defend in any court of law or equity" (12 U. S. C. § 341). Congress, by vesting Federal Reserve Banks with the power "to sue and be sued in any court of law or equity", expressly withdrew and intended to withdraw from Respondent any immunity from suit in the state courts and conferred upon persons so suing it the right to make use of any appropriate state civil remedy. This necessarily includes mandamus in the instant case. (*F. H. A.* v. *Burr*, 309 U. S. 242, 245, 249; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 281; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 152; compare *Calf Leather Tanners' Ass'n* v. *Morgenthau*, 80 F. (2d) 536, cert. den. 297 U. S. 718.) Under the *expressio unius* rule, Congress, in Section 632 of Title 12, U. S. C. by specifically excepting Federal Reserve banks from attachment or execution before final judgment authorized all other state civil remedies to be applied against them. *F. H. A.* v. *Burr*, 309 U. S. 242.

The ordinary jurisdiction of the state courts is not to be defeated by implication (*Galveston, H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481-490; *People* v. *Welch*, 141 N. Y. 266, 272-3). The failure of Congress by the Tariff Act to vest power exclusively in federal courts is in effect an affirmation by Congress of the constitutional right of the state courts to use their ordinary powers and remedies to enforce those rights. This is confirmed by the fact that Congress had withheld from all federal courts having jurisdiction over Respondent the power to issue original writs of mandamus, but Congress had granted power for Respondent to sue and to be sued in state courts (Title 12, U. S. C. § 341). Of the federal district courts, only the Supreme Court of

the District of Columbia has original jurisdiction to issue mandamus (*Kendall* v. *United States*, 12 Pet. 524). Of course, the Customs Courts have no such power. This Court will be astute not to construe by implication the Act so as to preclude the ordinary jurisdiction of the state courts, especially when any such implication would leave the Petitioner without any remedy to enforce the rights created by the Congress, and would subject it and all other importers to the arbitrary whim of Respondent. (Dissent of Conway, J., 286 N. Y. at 523-525, R. 50, 51; *De Lima* v. *Bidwell*, 182 U. S. 1, 177; *Jones* v. *Securities Commission*, 298 U. S. 1, 23-24; *Garfield* v. *Goldsby*, 211 U. S. 249, 261-262; *First National Bank* v. *Missouri*, 263 U. S. 640, 659-60; *Blair* v. *United States*, 6 F. (2d) 484, 486; *People* v. *Welch*, 141 N. Y. 266, 272-3; *Dudley* v. *Mayhew*, 3 N. Y. 9, 15.)

POINT SECOND

The Courts below erred in holding that the Supreme Court of New York was without jurisdiction to order respondent to comply with Section 522(c) of the Tariff Act of 1930, inasmuch as the Supreme Court, although a state court, can exercise its ordinary jurisdiction to compel respondent to comply with the federal law or to cease violation thereof, which, as the Supreme Law of the land, is also the law of the State of New York; and this because its order directing respondent so to do would not in any way interfere with respondent's duty or destroy or impair its official ability to perform its mandatory statutory function, and so would not encroach in anywise upon the sovereignty of the federal government.

(A)

Concurrent Jurisdiction of State Courts.

The Supreme Court of New York has jurisdiction, concurrently with the federal courts, to enforce rights created by federal statutes, including Section 522(c) of the Tariff

Act of 1930, in the manner commanded by such statutes where, as here, Congress has not made the jurisdiction of the federal courts exclusive, and has in terms permitted the Respondent to be sued in the State Courts. In the exercise of that jurisdiction, the Supreme Court of New York may grant any appropriate relief afforded by the New York laws, including an order in the nature of mandamus. For over a century, in substantially every form of civil action, the courts of New York and of the other states have exercised personal control over federal statutory agents acting unlawfully under color of a federal statute or beyond the scope of their statutory authority.

A state court may exercise this concurrent jurisdiction to enforce the federal law, even as against a federal agent. For over one hundred years and in substantially every form of civil action, the courts of this and other states, with the continuous approval of this Court, have compelled federal agents, including collectors of customs, to respond in damages for their failure to comply with federal statutes prescribing ther duties. (*Bates* v. *Clark* (1877), 95 U. S. 204, 208, 209; *United States* v. *Lee* (1882, 106 U. S. 196, 219-20; *Teal* v. *Felton* (1848), 1 N. Y. 537, 545-9, aff'd in 12 How. 284, 291-2, (doctrine reaffirmed in *Claflin* v. *Hauseman* (1873), 93 U. S. 130, 142); *Gelston* v. *Hoyt* (1816), 3 Wheat. 246, 334, aff'g 13 Johns R. 141, 151 (trespass against collector of customs); *De Lima* v. *Bidwell* (1900), 182 U. S. 1, 175-177, 179 (assumpsit against collector of customs); *Schall* v. *Newton* (1927), 217 App. Div. 171, aff'd 245 N. Y. 576 (conversion against a collector of customs).)

State courts have been held by this Court to have jurisdiction by mandamus or injunction to require federal agents to keep within their federal statutory authority and jurisdiction. (*Northern Pac. Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota* (1918), 250 U. S. 135, 152; *First Nat'l Bank* v. *Union Trust Co.* (1916), 244 U. S. 416.)

Thus it is clear that not only have state courts the jurisdiction to give judgments for damages against federal agents for violation of federal statutory duties and to require them to keep within the limitations of the authority and jurisdiction conferred upon them by the Congress, but also actually to order them to perform duties imposed by federal statute. (*Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152 (mandamus); *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, (quo warranto); *Matter of Hurley* v. *Nat'l Bank of Middletown,* 252 App. Div. 272, 273 (mandamus); *Witnebel* v. *Loughman,* 2 Cir., 80 F. (2d) 222, 225, *cert. denied* 297 U. S. 716 (mandamus); *Murray* v. *Walker* (1913), 156 Ky. 536 (mandamus). Also see: *Guthrie* v. *Harkness,* 199 U. S. 148 (mandamus); *Matter of Tuttle* v. *Iron Nat'l Bank,* 170 N. Y. 9 (mandamus); *People ex rel. Lorge* v. *Consolidated Nat'l Bank,* 105 App. Div. 409 (mandamus).)

This doctrine of concurrent jurisdiction was completely adopted and fully expounded by this Court in *Claflin* v. *Hauseman,* 93 U. S. 130. In that case the objections urged by Respondent and the grounds given by the Courts below were urged with great precision by the late Judge William Henry Arnoux (93 U. S. at 132) and definitely rejected by this Court, relying upon *Houston* v. *Moore* (1820), 5 Wheat. 1, and applying the fundamental principles expressed in the eighty-second article of the Federalist. (93 U. S. at 141, 138 et seq.: The doctrine of the *Claflin* case was completely endorsed and restated in *Second Employers' Liability Cases* (1911), 223 U. S. 1, 55-59, and in *Minneapolis & St. Louis R. Co.* v. *Bombolis* (1915), 241 U. S. 211, 218, 221-2.) (See also *Hines* v. *Lowrey,* 305 U. S. 85, 91.)

This concurrent jurisdiction of state courts in respect of federal agents is completely confirmed by the Congressional grant of permission and power to sue Respondent (Title 12, U. S. C. § 341) with all that that implies (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249), and by the tendency of Congress and recent decisions of this Court

sharply to minimize, if not wholly to abrogate, the immunity of federal agents acting under federal laws (*Keifer & Keifer* v. *R. F. C.*, 306 U. S. 38; *F. H. A.* v. *Burr*, 309 U. S. 242).

Until such time as the Congress acts to deprive state courts of their concurrent jurisdiction to enforce rights created by acts of the Congress, it is not only the right but the constitutional duty of the Supreme Court of New York to protect its citizens from the capricious and unlawful acts of federal agencies (*Claflin* v. *Houseman*, 93 U. S., 130, 133-143; *Second Employers Liability Cases*, 223 U. S., 1, 55-9; *Minn. & St. Louis RR. Co.* v. *Bombolis*, 241 U. S., 211, 218-221; *People* v. *Welch*, 141 N. Y. 266). Neither the Respondent nor the Government has been able to point to any provision of law either directly or impliedly depriving state courts of their ordinary concurrent jurisdiction to enforce rights created by § 522(c) of the Tariff Act of 1930. Furthermore, where, as with § 522(c), the federal statute fails to supply a remedy for its breach, the state court has power to grant such relief as its state laws may authorize in the manner and to the extent prescribed by its state laws even though a federal District Court might not have power to exercise a remedy open to the state court (*St. Louis B. & M. Ry.* v. *Taylor*, 266 U. S. 200, 207-8; *First National Bank* v. *Missouri*, 263 U. S. 640, 661; *Minn. & St. Louis RR. Co.* v. *Bombolis*, 241 U. S., 211, 218-221; *Dudley* v. *Mayhew*, 3 N. Y. 9, 15).

(B)

The reporting of the market rates in compliance with the tariff act is not and should not be an exception to the rule of concurrent jurisdiction.

There is no basis in law or reason for making this instance an exception to the general rule that, in the absence of Congressional restrictions, state courts have jurisdiction to enforce federal laws and protect rights arising under

them, in reason including the power to require federal agents to perform their statutory duties. This proceeding is against Respondent only individually to compel it to perform a personal statutory duty. An order directing it to comply or restraining it from violating that duty would not interfere with Respondent's official duties but would be in aid of the clear federal mandate. The description by the Courts below of the Respondent's incidental acts under §522(c) of the Tariff Act as "governmental functions" does not make them an exercise of the sovereign or political power of the federal government. Those prescribed duties are plainly mandatory and ministerial and their performance by federal agents should be ordered by state as well as Federal courts, which latter since Kendall v. *United States* (1838), 12 Pet. 524, *have exercised such jurisdiction for over one hundred years; for, otherwise and equally, federal courts would have no jurisdiction to require state agents to perform mandatory state so-called "governmental functions", which federal courts have compelled state agents to perform through the past seventy-five years.*

Mandamus or an order of that nature, like any other form of relief, is not directed to a statutory agent, such as the Respondent, in its "official," but in its "individual" capacity. It is the accepted remedy to compel a statutory agent to perform its statutory duties (*United States* v. *Boutwell,* 17 Wall. 604; *Warner Valley S. Co.* v. *Smith,* 165 U. S. 28, 32; *Pullman Co.* v. *Croom,* 231 U. S. 571, 575-6; *Marbury* v. *Madison,* 1 Cranch, 137, 166, 170; *Garfield* v. *Goldsby,* 211 U. S. 249, 261-2; *Wilbur* v. *Krushnic,* 280 U. S. 306, 318-9; *Matter of Lewis* v. *Carter,* 220 N. Y. 8, 18.

This Court, in *Northern Pac. Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota,* 250 U. S. 135, 152, pointed out that such a suit is not against the United States when the federal agent is alleged to have exceeded his authority. The fact that the Respondent may be a "federal statutory agent," while acting within the scope of its statutory authority, is quite immaterial. When

acting outside the scope of his authority he is merely a trespasser or usurper (*Bates* v. *Clark,* 95 U. S. 204, 209; *United States* v. *Lee,* 106 U. S. 196, 219-20; *Western Union Tel. Co.* v. *Henderson,* 68 Fed. 588, 598).

When state court actions have been met with this objection, courts having generally disposed of the point upon finding that the state court's usual concurrent jurisdiction had not been taken away by Congress granting exclusive jurisdiction over the subject to the federal courts. (*Teal* v. *Felton,* 1 N. Y. 537, aff'd 12 How. 284, 392; *People* v. *Welch,* 141 N. Y. 266, 273, 275; *Claflin* v. *Houseman,* 93 U. S. 130—doctrine reaffirmed *Hines* v. *Lowrey,* 305 U. S. 85, 91; *First Nat'l Bank* v. *Missouri,* 263 U. S. 640, 656; *First Nat'l Bank* v. *Union Trust Co.,* 244 U. S. 416, 427-8.)

The order sought by Petitioner would not interfere with the performance of the federal agent's official duties and would not destroy or in any wise impair that agent's authority and efficiency. It would bring about performance of the non-discretionary statutory duties and thus vindicate the office and authority and secure efficiency. The Respondent seeks to apply to state courts alone a limitation which applies to all courts. No court, state or federal, has jurisdiction to "interfere" with the lawful performance by a federal agent of its federal statutory duties, "governmental" or otherwise. The test of whether an order directing a federal agent to perform its statutory duties "interferes" is whether the relief sought would seriously or gravely impair or destroy the efficiency of the federal agent to discharge the duties imposed upon it by the federal act or would encroach upon the sovereignty of the federal government. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245. Compare: *National Bank* v. *Commonwealth,* 9 Wall. 353, 361-2 and *First National Bank* v. *Missouri,* applying the same rule to State legislation.) An order directing the Respondent merely to comply with the statute under which it is purporting to act, in this case Section 522(c), would not fall within this limitation. *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152. Such an order would be in aid of, and not

an interference with, the Respondent's pre-existing personal statutory duty (Compare: *Penn Gas Co.* v. *Public Service Comm.*, 225 N. Y. 397, 406; *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S. 406, 416-420; *Chicago, etc. Ry. Co.* v. *Solan*, 169 U. S. 133, 137-8; *Western Union Tel. Co.* v. *James*, 162 U. S. 650, 652). The only interference would be with Respondent's unlawful acts, which are not "official" and are nullities. (*Baird* v. *Supervisors*, 138 N. Y. 95, 115, 116; *Matter of Lewis* v. *Carter*, 220 N. Y. 8, 18). Since a federal court mandamus or injunction order, directing the Respondent to perform its mandatory ministerial, so-called "governmental" functions or duties, or restraining it from transgressing its authority and violating vested rights created by the act, would not be a prohibited "interference" (*Waite* v. *Macy*, 246 U. S. 606, 608-10; *Wilbur* v. *Krushnic*, 280 U. S. 306, 319), neither should a state court order in the same terms constitute such an "interference". In the words of Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch. 137 at page 170:

> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

The cases heretofore cited or to be cited against this position involve in each instance attempts to require the federal agent to do an act either beyond, or in violation of, his authority and so do not apply. (*McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Shockley*, 17 F. (2d) 133; *Ohio* v. *Thomas*, 173 U. S. 276).

If this relief were sought in a federal court having jurisdiction, the direction to the federal agent to perform its "governmental functions" would not be a prohibited "interference". By the same reasoning a state court judgment in the same terms would not be an interference. Respondent would be protected from any errors of the state court by its right to appeal to this Court, under Section 237 of the Judicial Code (28 U. S. C. A. 344, 861).

In reason it can make no difference whether the direction comes from a federal or a state court, as this Court has repeatedly declared that they are both courts of a common country and the laws of the state and the nation form one system of jurisprudence within the state (*Claflin* v. *Houseman*, 93 U. S. 130, 136-7; *Second Employees' Liability Cases*, 223 U. S. 1, 55-9; *Minneapolis & St. L. R. R.* v. *Bombolis*, 241 U. S. 211, 221-2; *Hines* v. *Lowrey*, 305 U. S. 85, 91). So long as the statutory duties are mandatory and ministerial and the statute prescribes even the terms of any discretion, these duties are enforcible. So long as the duty is mandatory and not discretionary it is immaterial that the duties sought to be enforced are so-called "governmental functions" and the courts have power to determine the correct construction of the statute and to compel the Respondent to proceed accordingly (*Kendall* v. *United States*, 12 Pet. 524; *Waite* v. *Macy*, 246 U. S. 606, affirming *Macy* v. *Browne*, 224 Fed. 359; *Merritt* v. *Welsh*, 104 U. S. 694; *Garfield* v. *Goldsby*, 211 U. S. 249, 261-2; *People ex rel. Hilliker* v. *Pierce*, 64 Misc. 627; *Lane* v. *Hoglund*, 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; *Louisville Cement Co.* v. *I. C. C. Commission*, 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914).

As is pointed out in the Petition for Certiorari (*supra*, pp. 14, 15), the Respondent's duty in reporting the rates actually registered by the New York market itself does not involve a "government function" in the sense of an act of the sovereign or an exercise of discretion or of political power.

Again, as pointed out in that Petition (*supra*, p. 18), the theory of exclusive governmental functions, if it really existed, would be mutual but this Court has negated that theory by holding that federal courts have jurisdiction to require state officers to perform governmental duties imposed upon them by state laws (*Riggs* v. *Johnson County*, 6 Wall. 166, 188 (73 U. S.); *Supervisors* v. *United States*, 4 Wall. 535; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *U. S. ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile*

v. *Watson,* 116 U. S. 289; *Marion County Court* v. *Huidekoper,* 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.,* 269 U. S. 172). So, also, it is the established law that the courts of the United States have power to enjoin state officers from exceeding their statutory authority (*Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Allen* v. *Balto. & O. R. R. Co.* 114 U. S. 164; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10, 13; *In re Tyler,* 149 U. S. 164; *Scott* v. *Donald,* 165 U. S. 107; *Reagan* v. *Farmers L. & T. Co.,* 154 U. S. 362; *Smythe* v. *Ames,* 169 U. S. 466; *ex parte Young,* 209 U. S. 123, 155, 158-9).

Surely, if the federal courts have jurisdiction to compel state agents to comply with the state law and would not "interfere" with state agents by commanding their performance, it must also be true that state courts have like jurisdiction over federal agents as to execution of federal statutes.

(C)

The Congress has not granted exclusive jurisdiction over market rates to any federal authority.

The Congress has not expressly vested exclusive jurisdiction over matters arising under Section 522(c) of the Tariff Act in the Collectors of Customs, in the Customs Courts having power to review their decisions or in any other federal court or authority. It cannot in reason be deemed that the Congress has established such exclusive jurisdiction by implication, inasmuch as neither the Collectors nor the Customs Courts, nor any other federal court having jurisdiction over Respondent has jurisdiction to bring it in as a party to the proceedings, or to compel it by any order or judgment, much less mandamus, to comply with § 522(c).

The Government has conceded in its briefs below that there is no direct language in the Tariff Act giving the federal customs authorities exclusive jurisdiction (At-

tached Petition, *supra* 22, 23). The claim is that this authority may be inferred from Sections 514 and 515 of the Tariff Act of 1930. These sections merely provide that all decisions of the Collectors, including the legality of all orders and findings entering into the same as to the rate and amount of duty chargeable, shall be final and conclusive upon all persons within sixty days thereafter, unless the importer shall file a protest in writing with the Collector; that, upon the filing of such protest, the Collector shall review his decision within ninety days; that, if he shall affirm the same, he shall forthwith transmit the matter to the Customs Court for determination as provided by law; and that the decisions of the Customs Court are reviewable by appeal to the Court of Customs and Patent Appeals.

Any inference from these provisions of exclusive jurisdiction is wholly unwarranted. No remedy is provided in terms by the Tariff Act for any failure on the part of the Respondent correctly to certify to the Secretary of the Treasury, or of the Customs authorities independently to apply, the actual buying rate. That rate is actually determined daily by the market and not by the customs authorities. These rates automatically registered in the New York market and directed to be certified daily by the Respondent, while they are a condition precedent to any use of them by the Collector in liquidating duties, are not any part of the ordinary customs process regulated by Section 514 (§ 1514, 31 U. S. C). Section 522(c) was a new section, creating new rights and, by implication, remedies, in addition to the older Section 514. This legislation, in the absence of specific exclusion, does not deprive the state courts of jurisdiction unless the remedy provided is adequate. *Waite* v. *Macy,* 246 U. S. 606; *Calf Leather Tanners Ass'n.* v. *Morgenthau,* 80 Fed. (2nd) 536, 542, *cert. den.* 297 U. S. 718; *Blair* v. *United States,* 6 F. (2d) 484, 486; *In re Fassett,* 142 U. S. 479, 487; *DeLima* v. *Bidwell,* 182 U. S. 1, 175-7; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15; *Oneida Com. Ltd.* v. *Oneida Game Trap Co.,* 168 App. Div. 769, 771, 774-8. Certainly these bodies are not

vested with any general judicial powers and Respondent could neither be brought in as a party to their proceedings nor could such authorities enforce any adequate remedy such as mandamus.

It is clear that Collectors of Customs and federal courts having power to review their decisions do not have exclusive jurisdiction over issues arising under the Tariff Act where they have no power to give adequate relief (*Blair* v. *U. S.*, 6 Fed. (2nd) 484, 486). The mere fact that the Collector might hold that Respondent had not complied with the law, is not enough, for then the duties would not be liquidated and Petitioner's deposits at unlawful rates would be unrecoverable. There still would be no way to compel Respondent to comply with Section 522(c) by certifying the actual market rate, unless the courts below have jurisdiction to command Respondent, and the customs authorities and courts have no such power. Any remedy, other than mandamus, is inadequate and no bar to the relief sought by Petitioner. (*Kendall* v. *U. S.*, 12 Pet. 524; *Fremont* v. *Crippen*, 10 Cal. 211; *American Ry. Frog Co.* v. *Haven*, 101 Mass. 398; *Eureka Pipe Line Co.* v. *Riggs*, 75 W. Va. 353, 83 S. E. 1020, 93 A. L. R. 590-591, anno.) Judge Conway definitely stated it as follows (286 N. Y. at 524, 525, R. 51): "There is no other adequate remedy than mandamus. Recoverable damages are inadequate (*Kendall* v. *United States*, 12 Pet. at pp. 614, 615). There is no jurisdiction in the customs authorities or courts to consider the question and, if there were, the power could not be effectively or adequately exercised by customs authorities or courts, for respondent would not or could not be a proper party to those proceedings and, if it were, there exists no power in those customs authorities or courts to command compliance by respondent with the Tariff Act by certifying the actual market rates."

(D)

The local law, including substantive remedies, is made applicable by this Court.

Undoubtedly the right to mandamus is a substantive right, and the law of New York in its statutes and decisions giving mandamus or an order of its nature to prevent departures from mandatory statutory duties by governmental agents or officials is now plainly the local law to be applied in keeping with this Court's ruling in Erie R. R. Co. v. *Tompkins,* 304 U. S. 64.

It is sufficient under this subdivision to call this Court's attention to the fact that by its recent ruling in the *Erie R. R.* v. *Tompkins* case it has fully recognized the primacy of the local or state law, whether expressed in statutes or decisions of the highest state courts. Within this rule the right to mandamus, the only remedy which can possibly furnish petitioner with adequate relief, is a substantive and substantial right. The power to furnish an appropriate remedy is a state's right. The State of New York, however, by the Court of Appeals saying it was bound by the *McClung* case, disregarding the *Claflin* case and, not appreciating the *Tompkins* case, did not declare this right for itself, and so withheld mandamus. But this Court has very recently said: "This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States* v. *Ansonia Brass & Copper Co.,* 218 U. S. 452, 462-463, 471; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-745; *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540; *Pierre* v. *Louisiana,* 306 U. S. 354, 358." (*United States, Petitioner* v. *Pink* (February 2, 1942), United States Law Week (Vol. 10, Sec. 4), p. 4173.) Now, in keeping with this Court's recently declared rule, this Court should say to the New York Supreme Court that it *must* determine and apply its own remedies and may do so in this case by an order in the nature of mandamus, if upon a hearing the facts and merits are found to warrant it.

POINT THIRD

McClung v. _Silliman_, 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case, the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely _obiter_.

So far as the plaintiff in error is concerned, he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court, which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and holding of the _McClung_ case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority.

The Courts below have mistakenly relied upon the *McClung case* as controlling and conclusive authority on the unsound theory that this Court had there held that the federal and state governments were mutually exclusive jurisdictions and that the state court had no power to command or enforce performance by a federal agent of federal mandatory statutory duties, inasmuch as only the creator (the fed-

eral government) could control the acts of the created (the federal agent). This mistake is obvious, for any and all opinions there expressed by Judge Johnson as to the immunity of the federal agent from the order or direction of the state court of Ohio are purely *obiter,* for the Government and the federal agent had not appealed from the Ohio court judgment which also was in their favor and so this Court under the Judiciary Act was without any power to review and decide that question of federal immunity. That there was no intention to so decide that question appears from the fact that one year prior to the McClung case this Court, in *Houston* v. *Moore,* 5 Wheaton 1, 24 *et seq.* (with Judges Johnson and Story dissenting), had squarely decided that a state court had concurrent jurisdiction to execute and enforce the military law of the United States and to punish a violation of it. This jurisdiction of state courts was reaffirmed and reapplied by this Court in *Claflin* v. *Houseman,* 93 U. S. 130, 141-2, over the objection of counsel that the state court was without power even to "aid in enforcing" the federal law (See 93 U. S. at 132). This is made clear by Conway, J. (286 N. Y. at 517-522, R. 45-49).

On the part of *McClung,* the Petitioner for the writ, this Court had appellate jurisdiction under the Judiciary Act. Accordingly, that case is then definitely authority for the rule that the state court had jurisdiction in a proper case to issue mandamus, inasmuch as, instead of directing the Ohio state court to dismiss for lack of jurisdiction to issue a writ to a federal agent, this Court affirmed the judgment dismissing after trial and on the merits the application for mandamus. Clearly the further opinion of this Court "that the said supreme court of the State of Ohio had no authority to issue a *mandamus* in this case", refers simply to the lack of merits "in this case" and not to the inaccurate opinion expressed by the headnote that: "A state court cannot issue a mandamus to an officer of the United States." All this is again made clear by Conway, J. (286 N. Y. at 514 *et seq.,* R. 42).

The *McClung* Stipulation of Facts was made by stipulation in the Ohio Court, which is on file with, and made a part of the records of this Court (286 N. Y. at 515, R. 43), and is printed as an Appendix to this brief (pp. 57-60, *infra*).

The pertinent facts contained in the Stipulation of Facts and some of the Conclusions of law necessarily resulting therefrom are set out in the dissenting opinion of Conway, J., in the New York Court of Appeals (286 N. Y. at 516, 517, R. 44, 45) as follows:

> "* * * As appears from the stipulation of facts, prior to McClung's attempt to have the Register enter his application, a part of the land in question had been duly sold by a former Register of an earlier land office in another district and a United States patent had been issued; another part had also been sold by the same Register and the purchaser had made full payment although he had not received his patent; and the remainder of the land had been sold at private sale in accordance with the law. Accordingly, no part of the land McClung was seeking to preempt was a part of the public domain at the time he made his application. It had ceased to be within the jurisdiction of the land office and was no longer subject to entry or to disposition by the land officers. The Register had no power or duty to do the act which McClung sought to force him to perform. (*Simmons* v. *Wagner*, 101 U. S. 260, 261, 262; *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 17, 18.) For that reason no court, State or federal, *had power* to grant the relief sought in the *McClung* case. * * *"

In addition, McClung's application, as appears by the record in this Court, was made under the Act of Congress of May 10, 1800 (2 Stat. 73) governing the sale of Public Lands in the Northwest Territory prior to the organization in 1804 of the Zanesville Land Office. The sales of the different parcels of land had been made either prior to or in 1803, and a United States Patent had been issued in 1803 to the purchasers of a large part of the lands. McClung's application to the Register Silliman to make his "entry" was made in 1810.

In addition to the foregoing, the following conclusions from the stipulated facts are briefly stated, as completely adequate to overcome and distinguish the *McClung* case as authority for the Courts below and for Respondent, and to confirm its holding as sufficient authority for Petitioner:

(1) That the Act of May 10, 1800 (2 Stat. 73), under which McClung sought his mandamus, was not applicable to the question of the Register's immunity as a federal officer, since the lands in question had been removed from the jurisdiction of the land office and of the Register by prior auction sales under the Act and issuance of a patent or a final certificate of purchase to the several purchasers, who thus obtained complete legal title which could not be attacked in an action at law.

(2) McClung, under the Act, had no "right of entry" to these sold lands.

(3) The Register Silliman had no statutory right or power to act and had refused to act for lack of such power, and therefore could not claim that he had exercised any "authority" under, or derived any immunity from an applicable statute.

(4) As the act was not applicable and was not applied, no federal question of the Register's immunity thereunder from the jurisdiction of the Ohio court was properly before this Court which, under the 25th Section of the Judiciary Act of 1789, had no appellate jurisdiction to pass upon the immunity of the defendant, as a federal officer, from the jurisdiction of the Ohio court (see cases on page 19 of Petition for certiorari).

(5) As the defendant Silliman failed to take out a writ of error, he could not raise before this Court the question of his immunity from the jurisdiction of the Ohio court.

(6) McClung's writ of error, on the other hand, raised only the question of the validity of the prior sales under

the act and of the existence or non-existence of a right of entry on his part, and this Court had appellate jurisdiction under his writ only to pass on those questions.

(7) The prior paid-up purchasers of the lands in question were the real parties in interest, and McClung's mandamus proceeding was fatally defective because of his failure to include these purchasers, who were the legal owners of the titles, as parties defendant (*Brady* v. *Work*, 263 U. S. 435; *New Mexico* v. *Lane*, 234 U. S. 58; *Lichfield* v. *Register and Receiver*, 9 Wall. 575, 577-8; *Garfield* v. *Goldsby*, 211 U. S. 249, 261, 262).

Further, as indicated by Mr. Justice Johnson (6 Wheat. 605), McClung had an adequate and immediate remedy against the patentees for the portion of the lands west of the Muskingum by action at law in ejectment or for damages and, after the issuance of a patent, by a bill in equity against the patentees for the land east of the Muskingum. *Marquez* v. *Frisbie*, 101 U. S. 473, 474-6.

(See also pages 5-7 and 16-19 of annexed Petition for Certiorari; also dissenting opinion of Conway, J., 286 N. Y. at pages 514-522.)

In Conclusion

The foregoing brief adequately supports the Petition for Certiorari in respect of the controlling or exclusive ground given by the Courts below for the dismissal of the Petition, that is: the lack of jurisdiction in the Supreme Court of New York to issue an order in the nature of mandamus against Respondent, The Federal Reserve Bank of New York; and this brief also shows that there is no power in the customs authorities and Courts or any other Court having jurisdiction over the Respondent to grant petitioner the needed relief and to make Respondent a party to its proceedings, or to render against it any enforceable judgment (286 N. Y. at 524, 525; R. 50, 51 (fol. 53)). Inasmuch as the Supreme Court of the District of Columbia, while not having jurisdic-

tion over the Respondent, has been held to have jurisdiction to mandamus the Secretary of the Treasury, or a Tariff Commission, to comply with a mandatory ministerial provision of a Tariff Act (*Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 Fed. (2d) 536, *cert. den.* 297 U. S. 718; *United States* v. *U. S. Tariff Commission,* 6 F. (2d) 491, rev'd in 274 U. S. 106, on ground that case had become moot), there is no good reason why the New York Supreme Court, under its concurrent jurisdiction, should not have the same power to mandamus the Respondent.

The other grounds presented by Respondent's objections in point of law (R. 20 (fol. 28)), call for no consideration by this Court, as they will be properly disposed of by the Court of original jurisdiction on any trial, if this Court reverse and remand.

POINT FOUR

The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits.

Respectfully submitted,

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